SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 164.

THE CITY OF DAWSON, APPELLANT,

vs.

THE COLUMBIA AVENUE SAVINGS FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY.

SUPPLEMENTAL BRIEF OF JOHN I. HALL AND OLIN J. WHEELER, COUNSEL FOR THE COLUMBIA AVENUE SAVINGS FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY, APPELLEE.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1905

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 154.

THE CITY OF DAWSON, APPELLANT,

vs.

THE COLUMBIA AVENUE SAVINGS FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY.

Supplemental Brief of John I. Hall and Olin J. Wimberly, Counsel for the Columbia Avenue Savings Fund, Safe Deposit, Title and Trust Company, Appellee.

Exclusive Franchise, and the Question of the City's Right to Revoke.

I.

It will not be questioned, as we take it, that the city of Dawson had authority to provide water supply for fire protection and for the domestic use of its inhabitants. As shown in the principal brief, the Georgia courts have uniformly held from the beginning until the present time that a city or town in Georgia has such power under what is commonly called the "General welfare clause." The court

recognizes that this power is broad and unrestricted, except so far as this has been qualified by the construction recently placed by our supreme court upon the meaning of the term "debt," as used in the Georgia constitution.

The court recognizes that this right extends both to entering into a contract with a water company or individual and municipal ownership of water works. This is recognized in each of the three Dawson Water Works cases referred to in the brief, namely:

Dawson Water Works Co. *vs.* Carver, 95 Ga., 565;
Mayor & Council of Dawson *vs.* Dawson Water Works Co., 102 Ga., 594;
City Council of Dawson *vs.* Dawson Water Works Co., 106 Ga., 696,

as well as in the

Cartersville Cases, 89 Ga., 683, 689, and
Lott *vs.* Waycross, 84 Ga., 681,

and the earlier cases cited on the brief and in the report of the master.

This "General welfare clause," which thus vests the city of Dawson with this power, is in the broadest and most general terms, the language being as follows:

"SECTION 6. *Be it further enacted*, That the said mayor and aldermen shall have power and authority from time to time, to make, ordain, and establish such by-laws, ordinances, rules and regulations, as shall to them appear necessary and proper for the security, welfare, convenience, and interests of the said city of Dawson, and the inhabitants thereof, and for preserving the health, morals, peace, order, and good government of the same and not inconsistent with the constitution and laws of Georgia" (Record, p. 222).

In this connection is to be considered the act of the General Assembly of the State of Georgia of November 12, 1889, codified as sections 2407, 2408, and 2409 of the Code of Georgia (edition of 1895), conferring on corporations or per-

sons "constructing, owning, operating, or carrying on water works in this State" the right of eminent domain by which they may acquire all land or easements of land "necessary or proper for the construction and successful operation of water works" by condemnation proceedings, instituted and conducted in the manner provided by the Code, and other rights and privileges. This act confers the privileges therein mentioned upon water works companies or individuals supplying water for public purposes to municipal corporations, the language used being:

"None of the provisions of the two preceding sections shall become operative until after the said corporation, company, or individual shall have *bona fide* entered into a contract with the proper authorities of some incorporated city or village of this State for supplying water for public purposes."
Code of Georgia, section 2409.

Thus the general law recognizes the right of cities and villages to make contracts for supplying water for public purposes with water companies or persons owning and operating water works in this State without any express restriction or limitation.

No restriction or limitation is to be found in any of the statute law of the State. There is nothing, therefore, in the law or public policy to make this power less broad or general than the general and broad language used in the charter would indicate. We believe that it will be recognized as a sound and well-settled rule of interpretation, without the necessity of citing authorities, that the more general the terms creating a power, the broader and more unlimited is the power. It is the office of particular provisions and specifications to restrict; general terms grant without restriction or limitation. This is a rule of logic, and, as we understand it, a universal rule of statutory interpretation.

The city, therefore, being vested with the power of entering into a contract with a water company for water supply for

public purposes, and there being no limitations or restrictions placed by the law upon the exercise of this power, it would seem that the city is not limited as to what terms and provisions it may embody in the contract, provided only the contract be not unreasonable.

This rule of interpretation, we think, is particularly true with respect to business or proprietary powers of the municipality, as distinguished from those powers which are more properly classed as governmental or sovereign.

The distinction between these two different classes of powers is well recognized, though, of course, even in the cases of business or proprietary powers, the city is still a governmental agency, clothed with powers appropriately belonging to the sovereign, and delegated to the city by the sovereign for the public good.

It would seem to be a rule, whose soundness cannot be questioned, that, in determining the extent of the business powers of a municipality, sound interpretation requires that the court should take into account existing business conditions. Under business conditions which exist and are well recognized, a company cannot afford to embark upon a large undertaking of establishing a system of water works, except with the expectation that for a reasonable limit of time the company should be protected from a dividing out of a field not big enough for two, and particularly from competition on the part of the municipality itself, which could only have one possible effect, namely, the destruction of the company's investment and the practical extinguishment of the rights of the water company. That a water company, as a practical business proposition, requires something more than a contract from year to year, and something more than a divided field, in order to exist and earn a revenue upon its investment, is a recognized fact, and no rule of interpretation can be sound which leaves this existing condition out of account.

For the court to hold that a city can make a contract for

water supply, for fire protection, and for the domestic use of its inhabitants, and yet at the same time hold that such contract can only be made under conditions and limitations which would render it impossible for the city ever to find persons willing to enter into such contract, is to hold that the city has a power which is theoretical rather than actual and practical. No city the size of Dawson can afford to have two rival systems of water works, with duplicate mains, duplicate pumps, duplicate reservoirs, and duplicate operating expenses. This is not only true of Dawson, but of the vast majority of the towns throughout our land having need of water works for fire protection and for the domestic use of its inhabitants.

If, therefore, the city has the right to provide for water supply, and such right means anything, it is the right to contract with a company for an exclusive supply.

As well stated by the supreme court of Iowa in a case recently decided by that court, "It requires no argument or citation of authorities to sustain the proposition that if the city had the power to make the contract for its supply of water it would not be void because of exclusiveness, for contracts for service of this kind must, in their very nature, be exclusive."

98 N. W. Rep., 892, Davenport Gas, etc., Co. *vs.* Davenport, page 896 of opinion.

II.

There is nothing in the Georgia constitution forbidding the creation of "perpetuities or monopolies," as there is in the constitution of several of the States. At common law an exclusive privilege to supply water or gas is not a monopoly.

"There are cases of exclusive privileges which are held not to be monopolies within the meaning of the common law, as the exclusive right to erect a bridge and take tolls. Thus it appears that the exclusive privilege to supply water

or gas are not considered monopolies according to the common law, because they do not deprive a class of persons of privileges of which they had anterior to the grant been in possession."

McQuillin on Municipal Ordinances, sec. 191, p. 306.

While not a monopoly as the term was understood at common law, yet it is conceivable that the use of the word monopoly in the State constitution might be regarded as such a general indication of State policy as would lead the courts of that State to adopt a more stringent rule with respect to contracts of this character, and we believe that it will appear on examination that in every State where the courts have denied a city's right to grant exclusive franchises to water and gas companies there exists a constitutional provision in terms forbidding the grant of a monopoly. Such at least is the case as far as our investigation has gone.

III.

It is, however, insisted on behalf of appellant that a contract for exclusive water supply is forbidden by article 1, section 3, paragraph 2, of the constitution of the State (Civil Code, sec. 5730). We think this insistence is founded upon a misapprehension of the true purpose and meaning of that provision of the constitution. The language of the provision is as follows:

"No bill of attainder, *ex post facto* law, retroactive law or law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities shall be passed."

Const. of Georgia, art. 1, sec. 3, par. 2, Code, sec. 5730.

In order to have the full provision before the court, paragraph 3 of the same section of the constitution, and which

immediately follows it, is to be read in connection with the foregoing, the same being as follows:

"No grant of special privileges or immunities shall be revoked, except in such manner as to work no injustice to the corporators or creditors of the incorporation."

Constitution of Georgia, article 1, sec. 3, par. 3 (Civil Code, sec. 5731).

These two paragraphs of the same section of the constitution cover the same subject-matter, employ the same form of expression, and evidently the latter is intended to restrict, limit, and qualify the former. The "irrevocable grants of special privileges or immunities" in the paragraph which precedes of course relates to the same thing as the revoking of "grants of special privileges or immunities" in the paragraph immediately following. Section 3 therefore in its entirety is as follows:

"No bill of attainder, *ex post facto* law, retroactive law or law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities shall be passed.

"No grant of special privileges or immunities shall be revoked, except in such manner as to work no injustice to the corporators or creditors of the incorporation."

While, therefore, the grant referred to in this section of the Constitution is not absolutely and unconditionally irrevocable, yet there is affixed a certain condition to such revocation, namely, that it shall be in such manner as to work no injustice to "the corporators or creditors of the incorporation."

It appears, therefore, that the grant of special privileges or immunities which the Constitution has in mind is of special privileges or immunities to a *corporation*, for nothing else except a corporation has "corporators" or "creditors of the incorporation."

The use of these words "corporators" and "incorpora-

tion" in this section of the Constitution seems to leave no room for doubt as to the character of the law making "irrevocable grants of special privileges or immunities" which the framers of the Constitution had in mind, even if we did not have regard to the history of the origin of statutory and constitutional reservations of this character.

Their history is nowhere more clearly set forth than in the opinion of Mr. Justice Miller in—

Greenwood *vs.* Freight Co., 105 U. S., 13,

and in the opinion of the same learned judge in—

New Jersey *vs.* Yard, 95 U. S., 104.

This court again reviews the subjects in—

Citizens' Savings Bank of Owensboro *vs.* Owensboro, 173 U. S., 637.

As will be seen by comparison with similar provisions in the constitutions and statutes of other States, and the public history which led up to their adoption, the above quoted section of the Georgia constitution is merely a reservation of the right to amend corporate charters so as to take the same out of the operation of the decision in Trustees of Dartmouth College *vs.* Woodward, 4 Wheat., 518.

As lucidly set forth by Mr. Justice Miller in Greenwood *vs.* Freight Company (above cited), the effect of the decision in the Dartmouth College case was to extend the protection of the contract clause of the Federal Constitution "somewhat in advance of what had been decided in Fletcher *v.* Peck (6 Cr., 87), and the preceding cases."

"It became obvious at once that many acts of incorporation which had been passed as laws of a public character partaking in no general sense of a bargain between the States and the corporations which they created, but which conferred private rights, were no longer subject to amendment, alteration or repeal, except by consent of the corporate body, and that the general control which the legislators

creating such bodies had previously supposed they had the right to exercise no longer existed."

Page 20 of opinion, 105 U. S., Greenwood *vs.* Freight Company, *supra.*

In the Dartmouth College case, Mr. Justice Story, in his concurring opinion, suggested that a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and hence such amendment or repeal of the charter thereafter could not constitute an impairment of the obligation of the contract.

A general statute or constitutional provision to the same effect would likewise be read into the subsequent statute passed subject to it, and would therefore be held to be a part of the contract.

As the opinion recites, "It would seem that the States were not slow to avail themselves of this suggestion."

Such being the obvious and well-known purpose of these provisions, it would be doing violence to the intention of their framers to extend the provisions to the case of ordinary contracts between the State, or a municipal corporation of the State in the exercise of its proprietary or business powers, and a person or corporation from whom the State or municipality purchased some article of necessity undertaking to pay therefor in money, and partly in things valuable to the other contracting party, or containing those safeguards without which the other party would not have been willing to embark upon the undertaking.

It is to be borne in mind that, as pointed out in the opinion above referred to, acts of incorporation, while possessing in a certain sense attributes of a contract, yet in another sense, and perhaps more largely, possess all the attributes of general legislation.

As pointed out by Mr. Justice Miller, it is frequently very difficult or perhaps impossible to draw the line which is to determine where legislation ends and contract begins. The

States therefore naturally sought to place laws of this char acter back where the same were supposed to stand before the decision in the Dartmouth College case.

The grants of "special privileges or immunities" referred to in the Georgia constitution are therefore grants contained in acts of incorporation, "laws" in the common acceptation of the term, as distinguished from contracts in the common acceptation of the term; "laws" relating to "incorporation," as distinguished from grants by contract which have no necessary connection with acts of incorporation, and therefore need no exception in favor of "the corporators or creditors of the corporation."

It is doubtless true that the State, acting in its ordinary business or proprietary capacity in the making of a contract, or bargain, in the popular acceptation of the term, may be said to pass a law. Every act of the legislature, whether administrative, or legislative in the narrower acceptation of the term, is a law. It cannot appropriate money except by law. It cannot contract for supplies for the State except by law. And the same may be said of cities and towns.

A State, for instance, making a contract for the construction of a State house, legislates, and the contractor who obtains the contract obtains a "special privilege" not enjoyed by others. The law awarding him the contract at the price therein fixed may, therefore, in a sense, be said to be the grant of a "special privilege." But it would hardly be argued that it was the grant of a special privilege within the meaning of article 1, section 3, paragraph 2, of the Georgia constitution; and it would hardly be contended that without cause, and while the contractor was carrying out his contract, and after he had incurred large expense in getting ready to carry out the contract, and in preparing materials which would be largely lost to him unless he could use the same in carrying out the contract, the State could repudiate the contract and leave upon his hands the stone and other materials suitable only for carrying out that particular con-

tract and causing the loss of the large investment that he had made for the purpose of carrying out the contract, and that this would be nothing more than the revoking of a special privilege which the constitution of Georgia, made with notice, the State would have the right to revoke, and that he therefore would have no right to complain.

In the same way it would seem that when a city contracts for water supply and sees fit to contract, not for a portion only of its water supply, but for the entire water supply for the reasonable time limited in the contract, or, in other words, makes the contract exclusive for that time, by reason of the business necessity that such contract should be exclusive, the contract does not fall within the operation of paragraph 2, section 3, article 1, of the constitution of the State.

IV.

It is doubtless true that a State entering into what may be denominated a private contract or a bargain between the State and an individual in the common acceptation of the term contract frequently embodies in the contracts features which would not be possible except for the fact that the State possesses attributes of sovereignty. Thus the State may by law authorize the issue of State bonds, and in the bonds provide that the coupons shall be received in payment of taxes—and there is no more sovereign power than that of taxation—and a provision of that character might in all likelihood add very largely to the attractiveness of the bonds. The possessor of such bonds would acquire a special privilege of a high order by reason of holding such a contract; yet it would hardly be contended that such a contract was revocable. So, in the same way, a city's right to provide water supply for fire protection and for the use and for the protection of the health of the inhabitants may, as an incident to the main undertaking, embrace

features which the city would not possess but for the fact that there has been delegated to it by the State the entire matter of providing water supply, with all its necessary incidents, and with all those things which under existing business conditions are essential to a contract of that character, for the reason that without them the other party could not afford to make the large outlay necessary for the purpose.

A contract by a municipality for water supply, while in a sense a law, and while in a sense a law granting a special privilege, in that the city does not grant to other persons during the same time the right of supplying it with water, yet, in its essence, is rather to be classified as a business contract for the supply of a necessary, for a consideration and with mutual safeguards and features of mutual benefit. It is not, therefore, the case of a law of a public character "partaking in no general sense of a bargain" between the city and the other party, according to the classification laid down by Mr. Justice Miller.

To hold that a contract of bargain and sale between an individual and a city acting in its business or proprietary capacity (though possessing also governmental powers) is revocable would, therefore, be to overturn the entire doctrine under which municipal corporations, equally with private individuals, are held liable upon their undertakings. The water company is bound to furnish all the water that the city and its inhabitants require. By mandatory injunction, as has been several times held, the water company can be restrained from refusing to furnish water to a single inhabitant. If it fails to furnish sufficient water for the use of all of the inhabitants and for all the other purposes mentioned in the contract, keeping pace with the growth of the city and its increased consumption, such violation is by the contract made a sufficient cause for revoking the charter.

If the city can require the water company to furnish water for all these purposes, and for every inhabitant, (and this no

one will contest,) then it is difficult to see upon what idea, consistent with the well-recognized rules that contract obligations are mutual, it can be denied that the city may contract that the water company so bound to furnish all the water required, shall have the right to furnish all the water required during the time that it is so bound by the contract.

V.

It will be seen that the opinion of the court delivered by Mr. Justice Miller in the two cases above referred to (Greenwood *vs.* Freight Co. and New Jersey *vs.* Yard) draws a very clear distinction between a contract within the narrower acceptation of the term, as a bargain between contracting parties, whereby one is to furnish services, or wares, which the other is to pay for in money or equivalent benefits, or *money and other benefits*, with covenants for mutual protection, and "acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created, but which yet conferred private rights," and which, when accepted by the corporators, "were no longer subject to amendment, alteration or repeal, except by consent of the corporate body," by which it was brought to pass "that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed."

It is distinctly recognized that only acts of incorporation, or amendatory acts of incorporation, "passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created," fall within the meaning and operation of these statutory and constitutional provisions, intended to reserve to the legislature legislative control over laws of this character, and that such reservations do not apply to those rights of the corporation founded on contracts which do partake of

the nature of a bargain within the narrower and, until the Dartmouth College case, the ordinary and more usual acceptation of the term contract.

In New Jersey *vs.* Yard (95 U. S., 104, *supra*), the court apply to a certain amendatory statute tests to determine whether it was the intention of the legislature to confer additional corporate charter privileges or immunities within the statutory reservation of the State's right to amend or revoke, or a contract proper, such as passed beyond the State's power to deal with and affect by future legislation. In that case, although there was no bargain in the sense that the State directly purchased services or necessaries, like a statehouse, public building, lights, water, etc., for which the State promised to pay, as would a private person contracting for services or necessaries of a similar character, yet the court held that the supplemental act of the legislature, granting tax exemption, was to be properly treated and regarded as a contract, intended as such by the legislature, and not a corporate charter amendment within the general statute reserving to the State the right to alter or revoke grants of corporate rights and franchises.

The court in reaching this conclusion lay stress upon the fact that the other party was required to formally accept the provisions of the supplemental act. And the court say: "Can it be believed that it was intended by either party to this contract, that, after it was signed by both parties, one was bound forever, and the other only for a day?"

Whether the court would again go to the length of holding that a tax exemption granted by a public statute, which contained so little of the character of a bargain in the general sense was contractual and not within these reservations, may be regarded as doubtful in view of the majority opinion in the later case of Citizens' Savings Bank of Owensboro *vs.* Owensboro, 173 U. S., 637. The distinction between contracts of a State or municipality, in the more limited sense of the term contract, and "acts of incorpora-

tion which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created," has, however, never been lost sight of in any of the later decisions.

The fact that it is laws of the latter character and not contracts of the former which the State has undertaken to reserve its right of control over by subsequent legislation, we think, is clear, whether we have regard to the origin of these reservations, as found in well-known public history, or the internal evidence afforded by the language of the various reservations themselves.

No reason appears, or at least is to be found in these reservations, why the State, when it entered the field as a purchaser of any commodity necessary to be provided by it, should not possess that freedom of contract which is not only just to the other contracting party, but which will be found to be useful to the State in order that it may be enabled to purchase the commodity on the most advantageous terms.

The right to furnish water to the city does not arise out of the charter of the water company. It is not a franchise or privilege that the charter creates or bestows. It is in no sense a corporate privilege or immunity. It is created by contract with the city. By means of the contract the city is merely carrying into effect for the public good a power which the State has seen fit to permit the city to exercise.

In fact, it is not necessary that persons entering into a contract of this character with a city should form a corporation at all. The act of November 12, 1889 (Civil Code of Georgia, §§ 2407, 2408, 2409), expressly recognizes the right of individuals, companies, or corporations to construct, own, operate, or carry on water works, and to enter into contracts with incorporated towns and villages for supplying water for public purposes.

If this last act create a franchise, therefore, it is not a corporate franchise; and if a corporate franchise, only the State,

by a repeal of the law, could revoke it, certainly the city could not.

The exclusive feature of the contract grows out of and inheres in the character of the subject-matter of the contract, the nature of the thing to be furnished and the service to be performed; the practical conditions which surround and circumstance the exercise of the power.

It is by nature, and under unavoidable conditions, an integral, indivisible something, and not a something to be parceled out amongst the citizens generally. For practical purposes, as a business proposition and as conditions exist in our villages, towns, and smaller cities, two water works companies or competing systems cannot occupy the same space at the same time. The privilege of furnishing water to the town is not for the benefit of the individual or the water works corporation, but for the benefit of the inhabitants of the town in their collective capacity. The right of all to furnish cannot exist consistently with the right of all to be furnished. The latter being paramount, the former must yield.

VI.

The above views, we think, are in harmony with and sustained by the authorities.

Thus the constitution of the State of Iowa provides:

"*Amendment of Repeal of Charters; Exclusive Privileges.*

"SECTION 12. Subject to the provisions of this article, the General Assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the General Assembly; and no exclusive privileges, except as in this article provided, shall ever be granted."

Constitution of the State of Iowa, art. 8, sec. 12; Ann. Iowa Code of 1897, page 101.

The constitution containing this constitutional provision was adopted March 5, 1857.

In Grant *vs.* City of Davenport (36 Iowa, 396), decided by the supreme court of that State at the June term, 1873, it was objected to a water-works contract containing the grant of the exclusive privilege of supplying the city and its inhabitants with water for a term of years, that such exclusive feature was violative of the constitution. The court sustained the contract, and the court say:

"It is further objected that the ordinance grants to the water company privileges and immunities which on the same terms cannot be enjoyed by all citizens. The ordinance and its acceptance by the water company constitute a contract. It can hardly be good law to hold this contract invalid because the city cannot make the same contract with every other citizen or company. Such a multiplicity of contracts might give the city too much water."

Ibid., 36 Iowa, 396, page 406 of opinion.

In a case recently decided by the same court the same doctrine is adhered to.

98 N. W. Rep., 892, Davenport Gas and Electric Company *vs.* City of Davenport.

In that case the court held:

"A city having the power to contract for lights for a certain period, its contract is not void because of the exclusiveness which arises from the very nature of such a contract."

Ibid., 98 N. W., 892, syllabus 6.

The court cites a number of authorities and discusses the validity of the grant of exclusive rights in contracts for the supply of water and gas. The court sums up its conclusion in the language following:

"It requires no argument or citation of authorities to sustain the proposition that if the city had the power to make the contract for its supply of water, it would not be void be-

cause of exclusiveness, for contracts for service of this kind must, in their very nature, be exclusive."

For a discussion of this subject—

See Bartholomew *vs.* City of Austin, Texas, 85 Fed. Rep., 359; 29 Circuit Court of Appeals, 568; 52 U. S. Apps., 512,

decided by the circuit court of appeals for the fifth circuit.

It will be seen that the case last cited involved the question of the validity of such a contract under the laws of the State of Texas, in which State there is a constitutional provision forbidding "perpetuities and monopolies." Under such a constitutional provision it might very well be held that there is indicated a State line of policy which extends the term monopoly beyond the meaning of the term monopoly as used at common law, or, as it might be otherwise expressed, beyond the range of monopolies forbidden by common law.

In Georgia, however, there is no constitutional provision dealing with the subject of monopoly or indicating any line of State policy forbidding the granting of exclusive rights and privileges.

In the section of the Georgia constitution above quoted, and which is relied upon by apellant, the word "exclusive" does not occur. Even if it be argued that the words "special privileges or immunities" are broad enough to include the grant of an exclusive right by contract of a thing which in its very nature is necessarily exclusive, yet it will be seen that the constitution does not forbid the grant of special privileges or immunities, but only provides that any law which the legislature may pass containing such grant shall not be irrevocable, but the same shall be subject to revocation; upon condition, however, that they shall only "be revoked in such manner as to work no injustice to the corporators or creditors of the incorporation."

In the constitution of the State of Mississippi it is provided:

"Corporations shall be formed under general laws only. The legislature shall have power to alter, amend or repeal any charter of incorporation now existing and revocable, and any that may be hereafter created, whenever, in its opinion, it may be for the public interest to do so; *provided, however*, that no injustice shall be done to the stockholders. * * *"

Const. of Miss., art. 7, sec. 178.
Thompson, Dillard & Campbell's Ann. Code of Miss. (1892), page 70.

In Vicksburg Water Works Company *vs.* Vicksburg, 185 U. S., 65, this court had before them a bill for injunction brought by the Vicksburg Water Works Company, which claimed an exclusive franchise to supply water to the city of Vicksburg, in which it was sought to restrain the municipality from constructing water works, under an act of the legislature of Mississippi passed subsequent to the making of the contract authorizing the city to issue bonds to purchase or construct, equip, and maintain a water-works system. Jurisdiction was predicated of the attempted impairment of contract, there being no diversity of citizenship. The exclusive feature of the contract relied upon by complainant was contained in section 1 of the ordinance constituting the contract, and which was in the following words:

"SECTION 1. That in consideration of the public benefit to be derived therefrom, the exclusive right and privilege is hereby granted for the period of thirty years from the time that this ordinance takes effect, unto Samuel R. Bullock & Company, their associates, successors and assigns, of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares and all other public places within the corporate limits of the city of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be extended, and within such other

territory as may now or hereafter be under its jurisdiction for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good wholesome water to the city of Vicksburg, Mississippi, and its inhabitants, for public and private use, and for making repairs and extensions to the said system from time to time during the period in which the ordinance shall be in force."

(The remainder of the contract in its general features is similar to the contract at bar.)

The bill was demurred to on the ground that the court was without jurisdiction, for the reason that it did not appear that a valid contract existed which it was sought to impair, and that there was therefore not presented a controversy which involves a Federal question under the laws or Constitution of the United States. The lower court sustained the demurrer and ordered the bill dismissed, but allowed an appeal to this court on the jurisdictional question presented. The court reversed and remanded the cause, holding that the cause presented a controversy so arising under the laws and Constitution of the United States as to give the circuit court jurisdiction. It is true the court does not expressly rule that the exclusive feature of the contract is valid, but we think that the reasoning adopted by the court indicates that this provision in the contract was, in their opinion, valid. The case at least sustains the jurisdiction of the circuit court in the case at bar upon this feature of the case, irrespective of the other equities contained in the present complainant's bill. The ruling of the court will, we think, sufficiently appear from the syllabus, which is as follows:

"By the act of March 18, 1886, the city of Vicksburg was authorized to provide for the erection and maintenance of a system of water works, and the contract made in accordance with its provisions was within the power of the city to make, and the subsequent legislation, State and municipal, set forth in the bill, impairs the contract rights of the water company, within the protection of the Constitution of the

United States, unless the city can point to some inherent want of legal validity in the contract.

"It is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where damages would be insufficient or irreparable; and the exercise of such is for the benefit of both parties, in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights.

"This cause presents a controversy so arising under the laws and Constitution of the United States as to give the circuit court jurisdiction."

185 U. S., 65, Vicksburg Water Company *vs.* Vicksburg.

Counsel for appellant in the court below and in this court have sought to distinguish the Walla Walla case (172 U. S., 1) from the case at bar upon the ground that the constitution of the State of Georgia forbids the grant of any exclusive right or privilege, or undertaking on the part of the city that it will not enter into competition with the water company in the furnishing of water during the life of the contract such as was granted by the contract in that case; relying upon the sections of the Georgia constitution above quoted as sustaining its contention. A comparison of the constitution of Washington which was in force at the time the Walla Walla case arose with the section of the Georgia constitution above quoted will show that the provisions contained in the constitutions of the two States are strikingly similar, and that the language contained in the constitution of Washington is in fact broader than the language contained in the Georgia constitution.

Under the constitution of the State of Washington, article 1, section 8, it is provided:

"No law granting irrevocably any privilege, franchise or immunity shall be passed by the legislature."

Ballinger's Ann. Code and Stats. of Washington, vol. 2, p. 2068; Constitution, sec. 8, art. 1.

It will be seen that this section does not refer in terms to a corporation or corporators, as does section 3 of article 1 of the Georgia constitution, above quoted, and therefore this language is to be referred to a reservation of the State's powers over corporate charters by inference from public history, unaided by any express language used, as in the case of the Georgia constitution.

Moreover, there is no provision in the Washington constitution that the revocation shall be in such manner as not to work injustice. Moreover, the words "any privilege, franchise, or immunity" are broader than the words in the Georgia constitution, namely, "special privileges or immunities."

Again, it is elsewhere provided in the constitution of the State of Washington:

"No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

Const. State of Washington, art. 1, sec. 12.
Ballinger's Ann. Codes and Stats., vol. 2, p. 2069.

No such provision as this is contained in the Georgia constitution.

Again, it is provided in the constitution of the State of Washington:

"The legislature is prohibited from passing any private or special laws in the following cases:

* * * * * * *

"6. For granting corporate powers or privileges.

* * * * * * *

"8. For incorporating any town or village, or to amend the charter thereof."

Const. State of Washington, art. 2, sec. 28.
Ballinger's Ann. Code, vol. 2, pp. 2088, 2081.

No similar provision is contained in the Georgia constitution.

Again, it is provided in the constitution of the State of Washington:

"Monopolies and trusts shall never be allowed in this State," etc.

Art. 12, sec. 22, Const. of the State of Washington; Ballinger's Ann. Code, vol. 2, p. 2117.

There is no provision in the Georgia constitution forbidding monopolies and trusts.

Again, it is provided in the constitution of the State of Washington:

"Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the legislature at any time, and all corporations doing business in this State may, as to such business, be regulated, limited, or restrained by law."

Const. State of Washington, art. 12, sec. 8.
Ballinger's Ann. Code, vol. 2, p. 2113.

These constitutional provisions were all of them of force at the time the contract between the Walla Walla Water Company and the city of Walla Walla went into operation. The city of Walla Walla was incorporated by an act of the Territory of Washington, but we take it that we need cite no authority for the proposition that municipal charters are subject to modification by a change in the law or fundamental policy of the State at any time, the rule in the Dartmouth College case not extending to the charters of municipal corporations.

We shall later in the brief discuss the Walla Walla case more in detail; and we merely refer to it at this point in order to call attention to the fact that the decision in that case cannot be held inapplicable to the case at bar upon the ground that there is any difference in the constitutions of the two States.

Appellant relies upon the case of Bienville Water Sup-

ply Company *vs.* Mobile, 186 U. S., 212, as holding that a contract of this character may be revoked by subsequent act of the legislature. It will be seen, however, from an examination of that case, that the court holds no such thing; but that the court is dealing with a corporate franchise contained in the water company's charter, and not with the terms and covenants of a contract between a city and the water company. On the contrary, it appears that the water company's contract with the city would expire before the city expected to supply itself with water. It was never contended by the city that it had any right to enter into competition with the water company for the supply of water for fire protection or for the use of the inhabitants until after its contract should expire. The Bienville Water Supply Company claimed that after the expiration of its contract with the city on July 1, 1900, it still had the right to an exclusive franchise under certain acts of the legislature.

The Supreme Court said:

"The plaintiff took its charter with notice that it was not given the exclusive right to supply the city of Mobile with water, and it had not at the time of the transaction referred to in the pleadings, *obtained that which its charter, before amended, authorized it to obtain, to-wit: the exclusive right to all sources of supply in the county.*"

186 U. S., 212.

The facts of the case were these: In 1840 the city of Mobile, which at the time owned a water-works plant and source of supply on what was known as Three-mile creek, entered into a contract with Stein, in which he received the exclusive right to supply the city with water from said stream, the city being given the right to purchase his plant at a price to be fixed by arbitration. This contract was ratified by the act of the legislature. Stein constructed his plant, and it was for many years the sole source of supply. This source not proving satisfactory, a charter was after-

wards granted to the Bienville Water Supply Co. by two statutes, dated February 19, 1883, and February 14, 1885.

By these statutes the company was given the right to purchase the Stein franchise, which, by the contract with Stein, was granted the city, and for that purpose was to be considered the assignee of the city; also the right to acquire by contract with the owners any other franchise and plant for supplying Mobile with water, including the right to condemn necessary supply under the State's right of eminent domain. These statutes gave the water company for twenty years, and until the purchase of the plant by the city, the exclusive right to supply the city with water from any source other than the Three-mile creek already granted to Stein, and, in the event it should acquire the Stein franchise, the exclusive right from that creek also. The statute, however, qualified this exclusive grant by making the same subject to this proviso: "But nothing in this act shall be considered to prohibit the organization hereafter of any other company for the purpose of supplying the city of Mobile or any other place with water which does not interfere with the property rights, or rights obtained herein to this company."

The owners of the Stein franchise endeavored, by litigation, to prevent the erection of appellee's plant, but in the case therein referred to (141 U. S. 67,) Stein was held to have no exclusive franchise except with respect to the source of supply known as Three Mile creek, which he had purchased from the city. The Bienville Water Supply Company constructed its plant and supplied the city of Mobile with water under contracts, the last expiring July 1, 1900.

By the act of February 23, 1899, its charter was amended by striking out the word "exclusive," thus leaving a grant, but not an exclusive grant. By amendment to its charter the city of Mobile was granted authority to build or acquire water works, subject to the approval of its citizens by a majority vote. The approval was given. The Bien-

ville Water Supply Company did nothing towards purchasing or condemning the Stein franchise and property. After the amendment to its charter and the authorization by the popular vote, the city passed a resolution to purchase the Stein franchise and property, and undertook to arbitrate under the provisions of the Stein contract, but the arbitration was held illegal.

A bill was brought by the Bienville Water Supply Company against the city of Mobile, setting up the rights given it by the aforesaid acts of 1883 and 1885, constituting the charter of said company, and contending that the legislation authorizing the city to build water works and the steps taken therein were in violation of the contract clause of the constitution. The constitution of Alabama gave the General Assembly the power to alter, revoke, or amend any charter of a corporation, and forbade the General Assembly from passing any law making any irrevocable grants or special privileges and immunities. The supreme court held that the plaintiff took its charter with notice that it was not given the exclusive right of supplying the city of Mobile with water, and that it had not at the time of the transactions obtained that which its charter before amendment purported to authorize it to obtain, to wit, the exclusive right to all sources of supply within the county. The court upon this subject quote a decision of the supreme court of Alabama.

The court say :—

" It cannot be pretended that, in granting a charter to the complainant company in 1883, the legislature conferred on that company any exclusive privilege of supplying the city of Mobile and its inhabitants with water. *All rights not exclusively granted to the complainant were reserved*, and the rights thus reserved included the granting of a franchise to another corporation to carry on the same business in the same territory. While the effect of granting such a franchise, afterwards, to the city, might be to impair and possibly by fair competition to ultimately largely destroy the value of complainant's plant, it would not be in excess of legisla-

tive power to grant the franchise to the city, nor would it in anywise infringe the Federal Constitution, prohibiting a State legislature from passing laws impairing its obligations. *If there is no contract, there is nothing in the grant on which the constitution could act.* The element of a contract by the State with the complainant company did not enter into the grant of its franchise to establish and operate a system of water works in Mobile."

186 U. S., 212, Bienville Water Supply Co. *vs.* Mobile, pp. 218 and 219 of the opinion.

And in that connection, as construing what was meant by the charter, the court quotes and discusses the provision of the constitution of Alabama touching irrevocable grants and special privilegess or immunities.

It will be seen, too, that the *irrevocable grant* that the court referred to was the grant of the right to acquire an *exclusive franchise in the future*, which had not been acquired up to the time that the charter was amended. It is a familiar principle that up to the time that a corporation acquires property and spends money or does some other equivalent act under the franchise granted it the franchise is not irrevocable. Up to the time that the franchise is exercised it is a mere license, and the State may withdraw the privilege by an amendment to the charter.

As has been held in the case of such grants to railroad companies, "*the railroad company has no vested right in the continuance of the municipal power to confer a benefit.*"

15 Am. & Eng. Ency. of Law, 2d ed., p. 1036.

Up to this time the franchise does not acquire its character of a vested right which can be impaired. When, however, a power or franchise of this kind has been actually exercised and contract rights or other property rights actually acquired under it, then such right becomes irrevocable, notwithstanding a power reserved in the constitution to amend a corporate charter. As the rule is stated in the work already quoted, in discussing the re-

served power to amend or repeal corporate charters or grants of privileges:

"But contracts between corporations and third persons cannot be impaired, nor can property actually acquired by the corporation be divested under the reserve of the power to amend or repeal. The amendment or repeal applies merely to future operations of the corporation and not past transactions. What has been done cannot be undone."

15 Am. & Eng. Ency. of Law, p. 1044.

In the case just quoted, Bienville Water Supply Co. *vs.* Mobile, 186 U. S., p. 212, the court distinctly recognizes that if the city had a subsisting contract, entered into during the time that the franchise was thus exclusive, and if the city were proposing to erect water works of its own, with a view of entering into competition with the water supply company, before the expiration of its contract, the exclusive franchise grant would have been irrevocable, notwithstanding the express provision of the charter that nothing should be considered to prohibit the organization thereafter of any other company for the purpose of supplying the city of Mobile with water, and notwithstanding the provision of the Alabama constitution that such grants shall not be irrevocable. *The grant that was held not to be irrevocable was the grant of a right to acquire an exclusive franchise not already acquired and of making exclusive contracts not already made. Up to the time that this was done no property right vested,* and therefore the legislature had the right to amend the charter. After a contract has been entered into no change in the charter could impair the exclusive feature of that contract. This case therefore has no application to the question under consideration. A charter is not in all cases a contract, and a franchise granted in a charter until acted upon does not acquire the quality of a contract. The right reserved by the legislature to amend a charter is a very different thing from the proposition that a city, having in consideration of valu-

able benefits entered into a stipulation that the plaintiff shall have certain rights or privileges, and the plaintiff having incurred expense in complying with its obligation, can afterwards refuse to be bound by its stipulations. There is nothing in the constitution or in the law which forbids the city, when it enters into a contract, from stipulating that it will continue to be bound by the contract and will not take part of it away and confer it upon another after the contractor has incurred the expense necessary for its full fulfilment.

The question of exclusive grant was fully and carefully considered by this court in the case of New Orleans Gas Company *vs.* Louisiana Light Co., 115 U. S., 650, and New Orleans Water Works Co. *vs.* Rivers, 115 U. S., 674.

In the case last cited this court holds:

"A legislative grant of an exclusive right to supply water to a municipality and its inhabitants through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee is a grant of a franchise vested in the State in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it."

115 U. S., 674, New Orleans Water Works Co. *vs.* Rivers.

"A legislative grant of an exclusive right to supply gas to a municipality and its inhabitants through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is a grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it.

"In granting the exclusive franchise to supply gas to a municipality, a State legislature does not part with the police power and duty of protecting the public health, the public morals, and the public safety, as one or the other may be affected by the exercise of that franchise by the grantee.

"The prohibition in the Constitution of the United States

against impairing the obligation of contracts applies to the Constitution as well as the laws of each State."

115 U. S., 650, New Orleans Gas Company *vs.* Louisiana Light Company.

The opinion of the court thus clearly states the principle which controls contracts of this character:

"We have seen, the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public purposes, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and means a public necessity for which the State may make provision."

Ibid., 115 U. S., 650, p. 669 of opinion.

In Citizens' Water Co. *vs.* Bridgeport Hydraulic Co., the supreme court of Connecticut deal with a contract granting the exclusive right to supply a city with water. The ruling there made is thus stated in the syllabus:

"In 1853 the common council of the city of Bridgeport accepted a proposition made by one G. to supply the city with water, and granted him (with a right of assignment) the exclusive right to lay pipes in the streets so long as a full supply of pure water should be furnished. In 1857 the Bridgeport Hydraulic Company was incorporated with power to acquire, and which did acquire, all the rights of G., under the vote of the city, and became charged with all his duties; and this company soon after expended a large sum of money in acquiring property and establishing its water works. Held, that so long as this company supplied the city with an abundance of pure water, the legislature had no power to give another corporation the right to lay its pipes in the streets of the city for the purpose of supplying the city with water."

55 Conn. Reports, 1, Citizens' Water Co. *vs.* Bridgeport Hydraulic Company.

In that case the court further hold:

"By a clause in the charter of the defendant company the legislature reserved the power to regulate the franchise at its pleasure. Held that this provision did not authorize the legislature to set aside or impair the contract which the city had entered into for the exclusive use of its streets by the defendant company, so long as it should supply the city with water, and which the charter had recognized and confirmed."

Ibid., 55 Conn. Reps., 1.

In the reply to the suggestion that the contract created a monopoly, the court merely observed:

"Communities may endure monopolies but they cannot endure the violation of contracts."

Ibid., 55 Conn. Reps., 1, Citizens' Water Co. *vs.* Bridgeport Hydraulic Company, page 16 of opinion.

VII.

We believe we have shown that the above-cited section of the constitution of the State of Georgia has no application to contracts like the present.

If, however, it were conceded that its provisions are applicable, we are unable to see how it would lend any support to appellant's contentions.

The constitution does not say that special privileges or immunities shall not be granted.

Nor does it say that a law granting special privileges or immunities shall not be passed.

It merely says they shall not be irrevocable.

Why irrevocable, if they could not be granted at all?

But the succeeding paragraph of the same section distinctly recognizes that special privileges and immunities may be granted.

For it declares: "No grant of special privileges or immunities shall be revoked, except in such manner as to

work no injustice to the corporators or creditors of the incorporation."

Const. of Ga., art. 1, sec. 3, par. 3; Civil Code, § 5731.

The constitution therefore recognizes that special privileges or immunities may be granted.

We all know that they are granted by the State and the various municipalities of the State.

Every railroad, every telegraph or telephone company, every gas, water, or electric light company, every street railway, every mining company, and many others, possesses some special privilege or privileges, not enjoyed by the public at large.

And so far is the protection of property in special privileges carried by our courts that a mere parol license cannot be revoked after the licensee has acted thereon and thereby incurred expense.

113 Ga., 481, Atlanta Railway & Power Co. *vs.* Atlanta Rapid Transit Co., pp. 491, 492.

12 Ga., 239, Mayor and Council of the City of Macon *vs.* Franklin.

71 Ga., 107, City of Atlanta *vs.* Gas Light Co.

72 Ga., 800, Mayor, etc., of Athens *vs.* Georgia Railroad.

The constitution of our State, even in the matter of reserving the State's legislative control over corporate charters, was careful to safeguard the reservation against danger of abuse.

Still less will it permit a contract in the more limited sense—a bargain for the purchase of an article of necessity, fairly and honorably made, and performed by the other party at great expense—to be repudiated under the claim that it was revocable, at the pleasure of the one party, to the ruin of the other party, upon whom it was obligatory for twenty years without right or power of revocation on the part of the latter.

The constitution in the same section declares that there shall be "no bill of attainder, *ex post facto* law, retroactive law, or law impairing the obligation of contracts" (par. 2, *supra*); and that "no grant of special privileges or immunities shall be revoked except in such manner as to work no injustice to the corporators or creditors of the incorporation" (par. 3, *supra*).

The clause appears in good company. *Noscitur a sociis.* It was the purpose of the framers of that instrument to protect the sanctity of public as well as private contracts; to rigorously uphold good faith and honest performance: not to invite and sanction repudiation upon any pretext; not to delare that he who entered into an onerous undertaking with State or municipality, and incurred large expense in order to faithfully perform on his part, must reckon it a special privilege to hold the State or city's promise that he would not be destroyed so long as the State or city might continue in an amiable mood, but that the promise was not binding, because it was a part of the contract that the State and its cities, towns, and villages should possess at all times the right of revocation.

The revocation must "work no injustice."

The State may, perhaps, exercise its right of eminent domain, for water supply is a public purpose.

115 U. S., 650, New Orleans Gas Co. *vs.* Louisiana Light Co., 673.

But this must be subject to the requirement found in this same section of the constitution:

"Private property shall not be taken or damaged for public purposes, without just and adequate compensation being first paid."

Const. of State of Georgia, art. 1, sec. 3, par. 1.
Civil Code, § 5729.

All these provisions are to be construed in accordance with the spirit of the instrument, as announced in the first section of the first article:

"Protection to person and property is the paramount duty of government, and shall be impartial and complete."

Const. of Ga., art. 1, sec. 1, par. 2; Civil Code, § 5699.

VIII.

It was suggested by counsel for the appellant, in the oral argument, that paragraph 3 of section 3, article 1, of the constitution of Georgia, viz., "No grant of special privileges or immunities shall be revoked, except in such manner as to work no injustice to the corporators or creditors of the incorporation," refers only to grants before the constitution went into effect.

Then, it may be asked, to what does the word "irrevocable" in the preceding paragraph of the same section refer? Why "irrevocable" if the special privileges cannot be granted at all?

But we think the fallacy of this suggestion will be seen at a glance.

Grants already made before this reservation by the State of the right to revoke would be protected by the impairment-of-contract clause of the Federal Constitution, and could not be revoked for want of power in the State, and the constitution would not have done the idle thing of defining and limiting the exercise of a revocation which could not be exercised at all.

But, aside from this, it is, we think, an elemental rule of interpretation that words occurring in the same instrument, in the same section of that instrument, and in immediate juxtaposition, must be understood in the same sense, when there is nothing to suggest that they were used in a different sense, and especially when such sense is that which the words naturally bear.

In the constitutions of some of the States the proviso which paragraph 3 annexes to the reservation in paragraph 2, section 3, article 1, of the Georgia constitution is found in the same clause and the same sentence with the balance of the reservation. Such is the case, for instance, with the constitution of Mississippi already quoted.

> Miss. Const., art. 7, sec. 178, Thompson, Dillard and Campbell's Annotated Code of Mississippi, p. 70.

And, indeed, without such proviso, in express terms, it would seem that the courts would read into the instrument something very much like it, upon the principle that it is to be presumed that the framers of the instrument and the people who adopted it did not intend to make possible rank injustice and confiscation of property.

Thus the reservation in the Iowa constitution, already quoted, contains no such proviso.

> Constitution of Iowa, art. 8, sec. 12, "Amendment or Repeal of Charters; Exclusive Privileges." [Annotated Code of Iowa, 1897, p. 101.]

The annotator appends to the section this note:

"Even though the power to regulate franchises is here reserved to the legislature, yet it would seem that such regulations must be reasonable or they will be invalid, (citing) Des Moines *v.* Des Moines Water Works Co., 64 N. W., 269."

> Annotated Iowa Code (1897), p. 101; note under art. 8, sec. 12, of constitution.

The cited case is in the official reports, 95 Iowa, 348, Des Moines *vs.* Water Co.

By the statute of Iowa it was provided that the councils of certain cities should have power to fix charges for furnishing water, and that the act "shall not be construed to authorize the passage of an ordinance or resolution or the

making of any contract whereby the above powers are abridged."

It was claimed that under this statute and the constitutional provision above cited the city had the absolute power of fixing rates.

The court in the opinion say:

"There is no doubt of the powers of the State to regulate the compensation to be paid to corporations in the exercise of a public service or employment, in the absence of any schedule of prices fixed by an arrangement in the nature of a contract. * * * But no court has ever yet announced the doctrine that the regulation of rates may be such as would be unreasonable or unjust. * * * It is to be remembered that the property of the water company is not mere commodity, which can, without material cost, be transplanted, and put in operation elsewhere. Its value consists largely in the matter of its location, and in the more than sixty miles of water pipes laid below the frost line in the city, and in machinery and appliances which are of value mainly because of the present uses to which they are applied."

95 Iowa, 348, Des Moines *vs.* Water Co., pp. 362, 363, 364.

IX.

We think, therefore, it was within the power of the city to make a contract for the entire supply of water for public purposes, including within that term water for fire protection and for domestic and sanitary purposes, and that the exclusive right granted by the contract is valid in its entirety for the life of the contract.

If not valid in its entirety and to the full extent of the import of the words taken literally, it is, nevertheless, to be upheld to the extent such grant was permissible.

For where a water-works contract is valid in part, and the water company has at expense complied with its part of

the obligation, the contract will be upheld and enforced to the extent the same is valid.

91 N. W., 1081, Cedar Rapids Water Co. *vs.* City of Cedar Rapids.

Same case, 117 Iowa, 250.

65 Northeastern Reporter, 1063, City of Valparaiso *vs.* Valparaiso City Water Co.

Cites 96 U. S., 341, Hitchcock *vs.* Galveston.

It will, we think, be convenient at this point to consider the language used with reference to the exclusive feature of the contract.

The contract in three different places uses words of exclusive grant.

For purposes of convenience the contract will be discussed as if made direct to the water works company, as it provides that the company shall be organized and incorporated, and that the contract was then to have the same force and effect as though that company had originally entered into it and signed it. This was done.

By section 1 the city grants to the company "the exclusive right and privilege for the period of ninety-nine years, of constructing, maintaining and operating a system of water works for the purpose of supplying said city and its inhabitants with water for protection against fire and for domestic, sanitary and other useful purposes."

Record, p. 288.

It will be noted that the term there named is 99 years, but by the contract the city only obligated itself to take and pay for the water for 20 years. This clause would, therefore, be construed to mean that the company was to have such exclusive right as long as the city might see fit to take and the company see fit to furnish water under that same contract, after the original 20 years had expired.

If, however, the right be not held valid for any part of the time after the 20 years, that would not prevent its being valid for the 20 years.

The second section of the contract provides:

"That the said company *for the purpose of constructing, maintaining, operating and repairing said system of water works shall have the sole and exclusive privilege and full power, right and authority to lay water pipes and mains along any and all the streets and avenues of said city, as the same are now open or may hereafter be extended,* and to that end shall have full right to dig ditches or trenches in the streets of said city, etc."

Record, p. 288.

This exclusive right, if valid, is as extensive as the purposes for which the same is expressed to be given. As the company bound itself to maintain and operate the system for 20 years, this period necessarily defines the extent of the duration of the exclusive right, unless forfeited as elsewhere provided in the contract.

Upon the same principle of construction this section also makes clear the extent of the scope of the exclusive grant.

By section 5 the company covenants that it "shall extend its mains and pipes, enlarge its plant, and generally enlarge its system from time to time to meet increasing demands consequent upon the growth of the city" (Record, p. 289). The express purpose of the exclusive right (sec. 2) being for the "constructing, operating, *extending* and repairing" of the system, and, the company being under obligation to extend as increasing growth increased the city's needs, the exclusive right granted reached and extended to all water for fire protection and domestic purposes that the city and its inhabitants might use or need in the future during the 20 years, as well as their present uses and needs.

Section 4 provides, *inter alia:*

"The said company and their successors and assigns, shall be and are required from the completion of their system of

water works, until their charter shall cease, to furnish a sufficient supply of water for the purposes before and hereinafter mentioned, unless prevented by unavoidable and providential causes; in such event they shall be allowed a reasonable time to make repairs, and if after such reasonable time has been allowed they should still fail to furnish said supply of water, their contract from that fact [shall] be forfeited" (Record, p. 289).

In Georgia a contract of this character runs for 20 years, with the privilege of renewal at the end of that time; and the contract elsewhere names 20 years as the time the contract was to run.

The company having thus, under pain of forfeiture, undertaken and agreed to furnish all the water that would be needed and used during 20 years, extending its system as increased water consumption might require, and the city having agreed that the water company should alone supply water during that period, and should have the exclusive right of laying water pipes and mains for such purpose, the contract is, therefore, a contract by the city with the company for its exclusive supply, both for fire protection and for the use of its inhabitants, unless the court should hold that the city has no right to contract for its exclusive supply, which is here the exact equivalent of its entire supply, for either or both of those purposes.

The contract on this point is express, clear, and unmistakable. There is no room for doubt as to what the parties intend. The contract does not require a second, or even a close, reading to arrive at its meaning and intention.

The inquiry would seem to narrow itself down to this: Does a city, vested with the right to contract with a water company for water supply for fire protection and for the domestic use of its inhabitants, have the right to contract for its entire supply? Or must it contract for some part of its supply, less than the whole, in order that the contract may be valid? And if the contract, in order to be

valid, must be for less than its entire supply, then for how much less than the whole is it requisite that the contract should be, in order for the courts to sustain its validity?

Section 10 of the contract declares:

"That full assent is hereby given to a charter to be granted by the legislature of the State of Georgia to the said R. L. Bennett and associates, their successors and assigns, or to be obtained by them under the general incorporation laws of said State, incorporating them into a body corporate under the title of the Dawson Waterworks Company, and *granting to said company the exclusive right to construct, maintain and operate a system of water works in said city of Dawson, for the purpose of supplying said city, its inhabitants, citizens and residents with water for protection against fire, and for domestic, sanitary and other useful purposes.* * * *"

(Rec., p. 290.)

The general incorporation law of Georgia referred to in this section of the contract, and under which the water works company was in fact incorporated pursuant to the contract, does not require or provide for a detailed and specific enumeration of the proposed rights and purposes of the corporation. It requires a statement of the general purpose of the proposed corporation and of the character of the business it proposes to carry on; and its powers under this general act are broad enough to embrace all those mentioned in the contract, including the part above quoted, or requisite to the carrying out of its purposes and provisions.

Contracts are to be interpreted according to the intention of the parties, as manifested by the language used. The language above quoted manifestly indicates and declares that it was the intention of the city that the water works company should have during the life of the contract "*the exclusive right to construct, maintain and operate a system of water works in said city of Dawson, for the purpose of supplying said city, its inhabitants, citizens, and residents with water for protection against fire, and for domestic, sanitary and other useful purposes.*" The law, which looks at substance rather than

form, will therefore, we think, interpret this provision of the contract as a declaration on the part of the city that the company should have such exclusive right for the purposes expressed. Taken in connection with the parts of the contract which precede it, and which make it the duty of the water company to furnish all the water the city and its inhabitants should require, it fairly constitutes an agreement on the part of the city that the company was to have the exclusive right to furnish the water which it obligated itself to furnish, namely, all that the city and its inhabitants should use or require. Differently stated, this provision merely makes the obligations of the contract touching a full supply, present and future, reciprocal, mutual, and equally binding on both parties.

X.

That a city having the right to contract for water for fire protection may validly contract with a water company for its entire supply for such purpose would seem to be clear.

That the use of the word "exclusive" in that connection means neither more nor less than "entire" seems equally clear.

A fair and rational construction of the contract would seem to leave no doubt that whatever else the parties may have attempted to stipulate they at least stipulated, and had the right to stipulate, that the water company was during the life of the contract (20 years) to furnish the city and the city was to take from the water company all of its water for fire protection. If the city had the right to stipulate that it would buy all its water for this purpose from the water company it had the right to stipulate that the water company should have the exclusive right to furnish it, for the two forms of expression mean precisely the same thing.

If the city had the right to contract with the water company for its entire supply for this purpose, then it undoubt-

edly had the right to stipulate that it would not embark in he business of doing what it had agreed the other party should have the exclusive right of doing, namely, supplying it with water.

A party certainly may as a guaranty of good faith stipulate that it will not threaten or prepare to do what it has agreed not to do, particularly when such preparation involves a waste of public treasure, to be made good by taxpayers, one of whom is the other party, and where the other party in order to be in a position to carry out its obligation needs unimpaired credit, which such threatened action will destroy and needs the revenue, which the other party owes and is diverting in making such preparation.

A city in making a contract "can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith, and with decent regard for the rights of the other party."

172 U. S., 1, Walla Walla City *vs.* Walla Walla Water Co., p. 18.

It was, however, suggested by counsel for appellant, in his concluding argument, that while, perhaps, a city may contract with a water company for its exclusive water supply for fire protection, it has no right to grant the exclusive right of supplying water for the use of its inhabitants for domestic purposes.

In passing, it may be proper to remark that if this proposition be pushed to its last analysis it would seem that it must be conceded that to the extent that it enjoins the city with supplying itself with water for fire protection, and building works, incurring expense of fire hydrants, requisite fire pressure, increased size of mains, etc., for that purpose, the grant of an injunction was proper, and if the city cannot build water works for that purpose, then, without permitting it to commit a breach of trust in the use of public money for a use not authorized by law, the city cannot be permitted to

build water works for any purpose; for in order to authorize a bond issue the purpose must be specifically declared, advertised, and voted on, and the money can be used for no other purpose. The voters voted for an issue for the purpose of buying or constructing water works for fire protection as well as domestic supply, and not the latter only.

We are unable, however, to see any sound or rational ground for the distinction sought to be drawn by the learned counsel between these two different purposes.

If the city has the right to provide a water supply equally for both purposes, and a contract with a water company is an authorized way of making such provision, then we cannot see why the contract so made, in the exercise of its undoubted power, does not bind the city, so far as it attempts to deal with the one purpose, to the same extent that it binds it when it attempts to deal with the other.

Water supply for its inhabitants is a public purpose, within the scope of the city's powers; otherwise the city would have no right to pay out the public money raised by taxation for such purpose; nor would the city have the right to issue bonds and levy taxes to pay interest and principal of the bonds for such purpose unless it was a public purpose, vested in the municipality and within its control, every whit as much as water for fire protection.

Wholesome water, in ample quantities for drinking, cooking, and other domestic purposes, is a necessity in the more crowded conditions that exist in the cities; health and comfort make this a municipal purpose, perhaps, second to none other in importance, not even the extinguishment of fire. It is for such purposes municipal government is established. We are aware of no authority which places the two purposes upon any different footing, or holds that the power of the municipality is any more circumscribed in the case of supply for one purpose than in the case of the other.

It seems to be hardly a sound proposition that the city has the right to contract for water supply for its inhabitants;

bind the other party to furnish water to every inhabitant in ample quantities; require the other party to incur great expense in the purchase of engines, pumps, machinery, the erection of water tower, the laying of pipes, the equipment of a plant amply to supply all water, calculated according to the needs of all—upon pain of forfeiture if the quantity furnished proves insufficient—but that the city is without power to stipulate that the company shall have the right to do what it is required to do, namely, furnish the inhabitants water, and all the water that they shall use; that such a contract binds only the party upon whom the burden falls; that the city is without power to stipulate that it will not itself enter into ruinous competition with the water company and destroy the property which the water company has invested in order to carry out its undertaking.

XI.

Counsel for appellants cite and rely on The City of Joplin vs. Southwest Missouri Light Company, 191 U. S., 150.

The court in that case merely hold that an exclusive right or franchise to furnish water is not to be implied where there is no language expressing or indicating the intent to grant the exclusive right. It was in that case argued that, although the grant was not exclusive in terms, yet the court would treat it as exclusive for the reason that competition on the part of the city might cause great loss and damage to the light company. The court hold that the only safe rule is to look to the language of the contract itself to determine the intention of the parties, and that it is not permissible to read into the contract stipulations that are not to be found therein; and the court point out that it would be against public policy to imply grants where there is no language to authorize the presumption that any was intended, and that such a rule, assuming the existence of the intention based upon speculation merely, without language to sustain it, would be

altogether too far-reaching and important in its consequences to be adopted by the court as a rule of construction.

The conclusion of the court is summed up in the following language:

"It is by implication from the statute and the ordinance passed under it, not from the explicit expression of either, that the conclusion is deduced that the city is precluded from erecting its own lighting plant, and yet it is conceded that the grant to the appellee is not exclusive. That is, it is conceded that the city has not exhausted its power under the statute by the grant held by the appellee, but may make another to some other person than the appellee. In other words, that the city may make a competitor to appellee, but cannot itself become such competitor. The strength of the argument urged to support * * * the distinction is in the consideration that competition by the city would be more effective than competition by private persons or corporations—indeed might be destructive. The city, it is further urged, could be indifferent to profits and could tax its competitor to compensate losses. But this is speculation and it may be opposed by speculation, and there are besides countervailing considerations. The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may seek to compete with it, and if the city cannot, the city is left with a useless potentiality while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights and against limitations upon the powers of government."

191 U. S., 150, City of Joplin *vs.* Southwest Missouri Light Company, pages 156, 157, of opinion.

We cannot see how this case has any possible application to the case at bar. In the case at bar the intention of the city not to enter into competition with the water company is shown by language express, clear, and of unmistakable import.

XII.

The controlling principle in cases like the present is so clearly laid down and forcibly stated by this court in the case of Walla Walla *vs.* Walla Walla Water Company, 172 U. S., 1, that it seems that nothing remains to be added. In that case, in construing a contract where the language used was much less strong than in the case at bar and where the constitution of the State contained provisions against the grant of exclusive franchises not to be found in the constitution of our State, the court point out the fundamental distinction between exclusive franchise in the true acceptation of the term and stipulations in a business contract like the present, amounting to more than that the city will take all its water from the water company and will not directly, by itself or through contract with another water company, enter into competition with the contractee water company for the supply of water which the parties expect and require such water company to fully meet and provide for the entire wants of the city and its inhabitants. As the court say :

"An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding twenty-five years. In establishing a system of water works the company would necessarily incur a large expense in the construction of the power-house and the laying of its pipes through the streets, and as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that in one of the sudden changes of public opinion to which all municipalities are more or

less subject, the city might resolve to enter the field itself—a field in which it undoubtedly would have become the master—and practically extinguish the rights it had already granted to the company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking."

172 U. S., 1, Walla Walla *vs.* Walla Walla Water Company, pages 17 and 18 of opinion.

As the court point out, a city in the exercise of an undoubted power to make a particular contract can hedge it about with limitations binding the city to carry out the contract in good faith and with decent regard for the rights of the other party.

Page 18 of Opinion.

XIII.

We think, however, that the contention urged by the city is not one which commends itself for fairness or the strictest of good faith, as the city well knows and as the evidence makes plain the city's purpose is not to erect water works for purposes of municipal supply other than the hydrants contracted for in this contract. On the contrary, the city conceived its scheme to build municipal water works only after it had by ordinance repudiated its contract and declared that it would no longer be bound thereby, and the question was submitted to the voters, not upon the theory that the city would continue to accept and pay for its fire protection, but for a proposed municipal water plant would supply water for all purposes and dispense with the necessity of the city's further paying the water works company for water. After the authority to issue bonds was voted the city held the matter in abeyance for five years for the purpose of first ascertaining whether it could uphold its

repudiation of the present contract, and only elected to proceed after it had satisfied itself that it could successfully carry out its purpose of repudiation. Under these circumstances the city's contention that it should be permitted to go ahead and erect water works upon the theory that this is not inconsistent with its obligation to accept and pay for this water furnished by the present company does not seem to be founded in perfect candor either to the court, the water company, or the taxpayers, who have authorized the bond issue. The city's position differently stated would seem to be about this: That it will split up its proposed purpose of repudiation in pieces smaller and lighter and easier to handle than the whole if carried at one time, and thus reach by easy stages its final destination of complete repudiation of its contract and the utter destruction of property rights of these bondholders.

XIV.

Addenda.

On the oral argument it was suggested by counsel for appellant that the action taken by the city council of June 27, 1894, is not to be regarded as an ordinance, but a resolution.

It will be seen by an examination of the city's charter that nothing is said about the city's passing any resolutions, but all official action in city council would seem to be regarded as by-laws, ordinances, or else rules and regulations for the internal management of its affairs. We think, however, under the decisions that it is to be determined not from form but from substance whether particular action is to be regarded as an ordinance or a resolution. There is no requirement of formality in the case of the passage of an ordinance different from that in the case of a resolution. 'Where the resolution is passed with all the formality of an

ordinance, it thereby becomes a legislative act, and it is immaterial whether called an ordinance or a resolution."

McQuillin, Municipal Ordinances, p. 6.

And see numerous decisions, State and Federal, cited in note 8.

The action taken on June 27, 1894, whether styled resolution or ordinance, was action destructive of contract rights—action which has formed the basis of the city's constant course of conduct from that time to the present. It was on the basis of this resolution or ordinance that the city has declined to levy any more taxes, although the original ordinance, constituting a contract, provided in express terms that it should levy such taxes. The original contract is an ordinance, and if the later action declining to carry it out is to operate as a repeal of the ordinance requiring the city to levy taxes and make payments, it is hard to see how the later action is to be regarded as of a less solemn character than the earlier.

Whatever may be the character, however, of the ordinance or resolution of June 27, 1894, there can be no question as to the legal status of the ordinances of November and December, submitting to popular vote the question of issuing bonds to build municipal water works and ordering the issuing of bonds for such purpose and the building of municipal water works therewith. Such submission to popular vote is not only an exercise of the city's law-making power, but constitutes law-making of the most solemn character possible under our Constitution. It calls into joint operation the law-making power of the city council and the citizen body making up the corporation.

XV.

In the oral argument it was suggested that the decision of the State court in the Dawson Water Works case is *res adjudicata* because, as appellant contends, the right to collect

these rentals was not completely vested in the trustee until after the decision in that case was rendered. Without discussing the legal merit of this contention, it is sufficient to say that under the facts found by the master, namely, that the city continued to use the water, the city is bound to pay these rentals under the decision in the Dawson Water Works case (106 Ga., 696, referred to).

We think, however, the question of *res adjudicata* is disposed of by adverting to the elementary principle that every person having a right or claim of any character whatsoever is entitled to his day in court, and no judgment in a case to which he is not a party can bind him unless his rights are acquired after the action is brought.

After stating the well-recognized rule that judgments only bind parties and privies, Mr. Black, in his work on Judgments, defines privity within the meaning of this rule stating that to create this relationship two requisites must exist:—

"In the first place the person who is thus to be connected with the judgment must be one who claims an interest in the subject affected through or under one of the parties. * * *

"In the second place, privies, in such sense that they are bound by the judgment, are those who acquired an interest in the subject-matter *after the rendition of the judgment.* If their title or interest attached before that fact they are not bound unless made parties."

2 Black on Judgments, section 549, pp. 831, 832.
See also Freeman on Judgments (3d edition), section 162, pp. 177, 178.

In Keokuk and Western Railroad Company *vs.* Missouri, 152 U. S., 301, the court hold that:

"A mortgagee is not bound by judgments or decrees, against the mortgagor in suits begun by third parties subsequent to the mortgage, unless he or his representative is a party to the litigation."

In discussing the question the court say (page 134 of opinion):

"While a mortgagee is privy in estate with a mortgagor as to actions begun before the mortgage was given, he is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the execution of the mortgage, unless he or some one authorized to represent him, like the trustee of a mortgage bondholder, is made a party to the litigation, although it would be otherwise if the mortgage was executed pending the suit or after the decree."

And see the discussion in that case and the authorities cited.

It would seem that nothing could be more clear than the rule thus stated. If the mortgagor in a case like the present can by anything that he does or omits to do destroy the rights of these bondholders, then precarious indeed would be the rights of all purchasers of this character of security; and if a form of security which is supposed to have the right of protection by the courts in the highest degree can be thus destroyed in litigation between other parties of which neither the bondholder nor his trustee has any knowledge, then these securities would hardly be worth the paper on which they are written.

The rights of bondholders stand at the basis of our entire industrial system, and it is through the issue of this class of securities that every section and every kind of enterprise have been developed. The courts have always afforded to bondholders the fullest measure of protection. We need not cite authorities in support of this proposition.

XVI.

The question of the correct interpretation of the Georgia constitutional limitation on the subject of municipal indebtedness is dealt with in our main brief. In addition to

what is there stated, we think it proper here to note the fact that upon comparison the section of the Georgia constitution referred to seems to be copied from the constitution of Iowa, article 11, section 3, which, it would appear, is the oldest constitutional provision to be found on the subject (Annotated Iowa Code, 1897, page 105).

The date of this constitution is March 5, 1857. At the June term, 1873, the supreme court of that State in Grant against The city Davenport, 36 Iowa, 396, construed the meaning of the term "debt" as used in this constitutional provision, as follows:

"Where a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limits of its current revenues and such special taxes as it may legally, and in good faith intends to levy therefor, such contract does not constitute the 'incurring of indebtedness' within the meaning of constitutional provision limiting the power of municipal corporations to contract debts.

"A contract entered into by the city with a company for the supply of water to the city for a term of years by such company, who was to receive a certain annual rate therefor, is one related to the ordinary expenses of the city, and the rate agreed to be paid is not an indebtedness prohibited by the constitution."

This construction of the Iowa constitution became a part of the meaning that instrument bore at the time its provision, in substantially identical language, was adopted by the framers of the Georgia constitution, and it is therefore fair to assume that it was the purpose to adopt the provision as construed by the courts of the State at the time.

Respectfully submitted,

JOHN I. HALL.
OLIN J. WIMBERLY.